IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

Crl.MC.No. 1037 of 2007()

AGAINST THE ORDER DATED 26/02/2007 IN CMP. 175 /2007 IN CMP.255/2007 of JUDL.MAGISTRATE OF FIRST CLASS, KAYAMKULAM

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PETITIONER: PETITIONER/PETITIONER

BHAHULEYAN,S/O.RAMAN,VALLATHARA VEEDU,
KUTAMANGALAM KARA,KINAKARI VILLAGE,
KUTTANADU TALUK.

BY ADV. SRI.D.KISHORE
SMT.MEERA GOPINATH

RESPONDENTS:

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1. STATE OF KERALA REPRESENTED BY ITS PUBLIC PROSECUTOR,HIGH COURT OF KERALA,\ ERNAKULAM.

2. ANEESH S.Y,S/O.YASODHARAN, SASTHAPARAMBIL,CHIRAKKADAVOM,KAYAMKULAM.

3. THE I.C.I.C.I BANK LTD,2ND FLOOR, SKYLINE,CITADEL COMPLEX,K.K.ROAD, KANJIKUZHI,KOTTAYAM,REPRESENTED BY ITS MANAGER.

BY ADV. SRI.KKM.SHERIF
SRI.P.M.KUNJIMOIDEENKUTTY
SRI.P.A.MOHAMMED ASHROF
SRI.LAL K.JOSEPH
SRI.A.A.ZIYAD RAHMAN
SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN
PUBLIC PROSECUTOR M.S.BREEZ

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 02/08/2007, ALONG WITH CRMC NO. 1058 OF 2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J.

Crl.M.C.Nos.1037 & 1058 of 2007

Dated this the 2nd day of August, 2007

O R D E R

Does the dictum in **Tarun Bhargava v. State of Haryana** [2003(3) KLT 397 Punjab & Haryana] as approved by Honourable Justice K.R.Udayabhanu in the unreported decision in **Shibi Francis v. State of Kerala** represent the correct law applicable in Kerala now ? Does the decision in **Shibi Francis** need reconsideration ? These questions are to be sorted out in this Crl.M.C.

2. These Crl.M.Cs are directed against a common order passed by the learned Magistrate. The rival contestants had claimed release of a vehicle in their favour under Section 451 Cr.P.C. The learned Magistrate by the impugned common order directed that the vehicle be handed over to the registered owner of the vehicle in preference to the person who claimed himself to be the present owner respectively. I shall hereafter refer to them as the registered owner and present owner. The present owner claimed rights from a finance company, I shall hereafter refer to

them as the financier, who had admittedly advanced amounts to the registered owner for purchase of the vehicle under a hypothecation agreement, a copy of which is produced as Annexure-XII. The financier had also appeared before the learned Magistrate and supported the claim of the present owner. The learned Magistrate without going into the disputed facts in detail, came to the conclusion that on the admitted case of the financier and the present owner there can be no transfer of title from the registered owner to the financier or the present owner. In doing so, the learned Magistrate placed reliance on the unreported decision of another Single Bench (Justice K.R.Udayabhanu) of this Court in **Shibi Francis v. State of Kerala** (W.P(C) No.21411 of 2006 dated 10.10.06). That decision had considered in detail the law on the question as to whether a financier advancing a loan under a hypothecation agreement has a right to repossess a vehicle in the event of default even if there be provisions justifying that course in the agreement between the parties.

3. That decision in turn placed reliance on an earlier decision of the Punjab and Haryana High Court reported in **Tarun Bhargava v. State of Haryana** [2003(3) KLT 397].

4. It is really not necessary for me to advert in detail to the facts in controversy but for the purpose of completion of narration, it appears only to be proper to advert to the same. The registered owner purchased a vehicle with the financial assistance provided by the financier. The registered owner is the title holder in whose name the registration certificate stands. He had the liability to repay the amounts in 60 instalments each of Rs.10,917/- commencing from 01.10.05. There admittedly was default in payment of the monthly instalments. It is the case of the financier that invoking the right of repossession under the contract between them, repossession was effected on 22.09.06. The registered owner has a contention that it was not lawful exercise of any such rights even assuming such right to be there; but it was a case of wanton criminal conduct of snatching away the vehicle by use of force from the driver of the registered owner on 21.09.06. There is a controversy between parties about actual date of repossession but that does not appear to be relevant to any extent. What appears to me to be relevant is that the financier has no case that there was willing and voluntary surrender of the vehicle nor is there a contention that any assistance of courts or authorities was sought or obtained for

such repossession of the vehicle. On the controversial facts as they now are, it is easy to accept the case of the registered owner that there was involuntary reduction of possession from the registered owner by the financier by use of force. There is of course controversy as to whether a report had been made before the local police and a G D entry is there in the local police station about such alleged forcible repossession. I take note only of the fact that there is no specific case of peaceful repossession or surrender at all. No such plea is raised in detail at all though it is admitted that the vehicle had been repossessed on 22.09.06.

5. According to the registered owner, his vehicle was illegally taken away from his possession and when he came to see the vehicle later, he arranged to detain it and got the same before the local police station. The local police detained the vehicle at the police station but did not take any steps obliging the registered owner to come to this Court with a petition raising grievance against the police. At that stage, the present owner filed a complaint before the Kayamkulam police through one Shyamlal, allegedly his driver, raising the grievance that the vehicle has been wrongfully detained and produced before the police. By Annexure-VI order, that proceedings before this Court

were brought to termination when it was reported by the learned D.G.P that crime No.2 of 2007 has already been registered and the needful shall be done. The option of the contestants to approach the learned Magistrate for release of the vehicle was kept open.

6. Financier and the present owner have a case that after the vehicle was repossessed from the registered owner in accordance with the terms of the agreement between them, a notice was issued to the registered owner who on receipt of the same did not respond at all. It is their further case that the vehicle was subsequently sold to one Mr.Saravanan/Fazil. From him, one Shaji allegedly acquired rights in respect of the vehicle. Later from the said Shaji, the present owner is alleged to have acquired rights in respect of the vehicle.

7. Before the learned Magistrate the rival contestants – registered owner and the present owner advanced their contentions claiming title over and right to possess the vehicle. The learned Magistrate had the relevant documents before him, but it is seen that they are not formally marked in the proceedings. The learned Magistrate by the impugned order, took the view that in the light of the declaration of law in **Tarun**

Bhargava v. State of Haryana which is followed by this Court in W.P(C) No.21411/2006 (**Shibi Francis v. State of Kerala**) the financier has no right of repossession and the alleged repossession and subsequent transfer by the financier in favour of others and ultimately to the present owner cannot confer any rights on the financier or the present owner. In view of that finding, the learned Magistrate proceeded to pass the impugned order.

8. I am bound by the decision of Justice K.R.Udayabhanu in **Shibi Francis**. It is true that the ultimate direction in that judgment stands stayed by the order of the Division Bench in W.A.No.2217 of 2006. Notwithstanding the suspension of execution of the ultimate direction, declaration of law does certainly bind me. A different view can be taken by this Court only if it is shown that the said decision is per in curium or if any subsequent decision of a larger quorum of this Court or the Supreme Court has taken different view. Of course, if this Court does not agree with the reasons given in the said judgment by Justice K.R.Udayabhanu, reference can be made to the Division Bench by this Court. Justice K.R.Udayabhanu in **Shibi Francis** in para.6 has unambiguously held asfollows:

> "I am in full agreement with the decision of the Punjab & Haryana High Court in **Tarun Bhargava's case** (op.cit). The right to take possession by force overcoming the resistance if any and thereby igniting to a law and order situation etc. cannot be conferred by agreement by the party who is in need and who would be agreeable to sign on the dotted lines. Enforcing the terms of the agreement by availing the services of a hired hoodlums is sought to be justified on the basis of the allegedly legally valid terms of the agreement."

The learned Judge has further taken the view that the subsequent decision of the Supreme Court in **Orix Finance (India) Ltd. v. Shri Jagmander Singh** [2006(1) KLT 814 (S.C)] does not in any way affect the said conclusion. That conclusion of my learned brother does also bind me.

9. I must say that I do also concur completely with the conclusion of the Punjab and Haryana Court in **Tarun Bhargava** and the decision in **Shibi Francis** which accepts the same. I find absolutely no reason to make a reference of the question to a Division Bench. The decision in **Tarun Bhargava** is also stayed by the Supreme Court, it is stated. But that does not at all affect

the dictum in **Tarun Bhargava** as endorsed by this Court in **Shibi Francis**. The view taken by the Punjab and Haryana Court accepted by another single Judge of this Court that in a loan-hypothecation agreement pure and simple, the financier has no right of seizure/repossession notwithstanding stipulations to that effect in the agreement/contract between the parties does appear to me to be eminently correct legally as also just and fair. The conclusion that such alleged high handed forcible repossession of the vehicle will not confer title on the financier who repossesses is also found by me to be totally acceptable. To me that view appears to be eminently correct legally. The said view advances the interests of justice. The said view helps the preservation of law and order. It arrests the growth of crime syndicates. It ensures that physically strong young men are not lured into a life of crime and vice. It caters to the interests of rule of law. It eliminates the influence of pelf, power and crime in settlement of civil disputes/money claims. I am, in these circumstances satisfied, that the decision in **Shibi Francis** does not require reconsideration and does not need any reference to a Division Bench by this Court. The said decision is challenged before the Division Bench and the matter will at any rate come up for

consideration before the Division Bench. In the meantime, it is not necessary at all for me to make any reference. I need only follow it.

10. If that be the correct legal position, it follows that the alleged repossession will not divest the registered owner of the title which he admittedly had prior to the repossession. The financier or subsequent transferees cannot in these circumstances set up, and persuade this Court to accept, any superior title or right to possession over that of the registered owner. I am in these circumstances satisfied that the registered owner was rightly found by the learned Magistrate to be the best person entitled to keep possession of the vehicle. The said decision of the learned Magistrate does not warrant interference invoking the powers under Section 482 Cr.P.C.

11. Contentions on facts have been raised by the rival contestants about the falsity of the case of the financier and the present owner as also about the inevitable inference which must be drawn from the alleged silence of the registered owner after getting a registered notice informing him of the repossession of the vehicle and the proposed sale. It is unnecessary for me to

delve into that controversy at the moment in the light of the view that I have taken on the question of law.

12. There is a contention raised that the later decision of the Supreme Court in **I.C.I.C.I Bank Ltd. v. Prakash Kaur** [2007(2) SCC 711] must be held to override the decision in **Tarun Bhargava** as also **Shibi Francis**. I have been taken through the entire decision. I find no specific statement of the law anywhere in the said decision which can persuade this Court to take the view that the decisions in **Tarun Bhargava** and **Shibi Francis** stand over ruled directly or by implication. The observation in para.28 of the said decision which I extract below does, if at all, only support the decision in **Tarun Bhargava** and **Shibi Francis.**

> Para.28: "In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans or seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force."

That decision cannot therefore persuade this Court to ignore the decision in **Shibi Francis** which endorses the view taken in **Tharun Bhargava.**

13. The learned counsel for the financier submits that **Tarun Bhargava** has not been decided correctly and that the view taken in **State Bank of India v. S.B.Shah Ali (died) & Ors.** [A.I.R 1995 Andrapradesh 134] must be preferred. The learned Judge in **Shibi Francis** having already chosen to accept the dictum in **Tarun Bhargava** and as I do not find any reason to disagree, it is unnecessary to embark on a more detailed discussion on that aspect. Having held so, I am not proceeding to consider the further contention that Act 54 of 2002 (The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) makes it clear that the Financier (the secured creditor) cannot exercise the right of repossession except in terms of the said Act.

14. Lastly and finally the learned counsel for the financier submits that at any rate, terms of the release in favour of the registered owner is most unfair, improper and unjust. Even on his own showing the petitioner is liable to pay instalments due to the financier. To permit him to keep the vehicle without any liability to pay even the instalments is certainly not justice, it is pointed out. I find merit in that contention of the learned counsel for the financier. Any just arrangement regarding interim

possession must certainly take note of the admitted liability which registered owner would otherwise have to discharge but for the repossession and the subsequent release in his favour. I am in these circumstances, satisfied that additional conditions must be imposed on the registered owner.

15. I must also very carefully note and clarify that the impugned order passed by the court below or this order of the Court shall not in any way fetter the rights of the financier or the present owner to stake appropriate claims before the civil courts and claim relief in accordance with law through such courts. The direction for release of the vehicle to the petitioner shall be only subject to any such orders which the civil court may pass in this regard. I repeat that the option of the financier and the present owner to approach the civil court and stake claim for appropriate relief including interim relief shall remain unfettered by the impugned order and this order.

16. In the result, these petitions are allowed in part and to a limited extent. The interim release of the vehicle to the registered owner is upheld subject to the following further condition. The learned counsel for the registered owner accepts his liability to pay all the instalments due.

The registered owner shall within a period of 45 days from this date deposit before the learned Magistrate or pay by D.D to the Financier all defaulted instalments (E.M.I) due till the date of payment and shall continue to deposit the future instalments of E.M.I due within the stipulated period until further orders. Such payments shall be made directly to the financier by D.D.

17. The learned counsel for the petitioner prays that there may be a direction to the financier to pay the amounts which he has already paid to the financier. The financier does not dispute the liability and in this order I do not think it necessary to issue any specific direction in that regard. I need only note that the learned counsel for the financier submits that as the sale is not accepted by the court, the financier is liable to return the money and the financier cannot illegally withhold that amount.

(R.BASANT, JUDGE)

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